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No. 84-2023

IN THE

Supreme Court of the United States

October Term, 1984

INDEPENDENT BANKERS ASSOCIATION OF NEW YORK STATE, INC., THE CANANDAIGUA NATIONAL BANK AND TRUST COMPANY,
Petitioners,

vs.

MARINE MIDLAND BANK, N.A.,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

SUPPLEMENTAL BRIEF OF RESPONDENT IN OPPOSITION

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Introduction

Pursuant to Supreme Court Rule 22.6, respondent, Marine Midland Bank, N.A. ("Marine"), submits this supplemental brief in opposition to the petition for a writ of certiorari.

Statement of Intervening Matter

It was stated at page 18 of Marine's brief in opposition that the New York Banking Department had not yet construed the 1984 amendment to New York Banking Law §105-a. On August 28, 1985 the Banking Department published notice of the adoption of new regulations relating to electronic facilities.[1] The regulations clarify and expand the Banking Department's 1982 interpretation referred to in the district court's decision (Pet. 45a). The text of the regulations is set forth in Appendix A to this brief. A copy of the Banking Department's letter dated July 29, 1985 is set forth in Appendix B to this brief.

Under §73.5(c) of the regulations, New York-chartered banks may authorize their customers to use a shared ATM or other shared electronic facility in a home office protected community "to obtain information about account balances, make cash withdrawals (including those that require transfers of funds among a customer's accounts) and obtain cash advances against credit lines." The outcome desired by petitioners—namely, that "no state or national banks other than the home office protected bank may use an ATM" in a home office protected community (Pet. 14)—is not possible under the new regulations.

Respectfully submitted,

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October 21, 1985

[1] *The New York State Register*, Aug. 28, 1985, p. 2.

APPENDIX A

General Regulations of the New York Banking Board, Part 73

Section 73.1 General Statement. A banking organization may conduct a banking business at electronic facilities that are either established (*i.e.*, owned or rented) or shared, on a transaction fee or similar basis, by such banking organization, subject to the provisions of this Part. Such facilities are not branches but are subject to the limitations contained in sections 28-b and 105(1)(ii), 240(2)(b), or 396(2)(b) of the Banking Law, as the case may be, as if they were branches.

Section 73.2 Definitions. For the purposes of this Part:

(a) 'Electronic facilities' shall mean automated teller machines, point-of-sale terminals, and similar facilities at which the banking business may be conducted. Such term shall not include home banking terminals, telexes, and similar equipment that is not established or shared by banking organizations.

(b) 'Automated teller machines' shall mean electronic devices, either on-line or off-line, which permit deposits, withdrawals, transfers of funds from one account to another, loan repayments, or disbursements of funds pursuant to prearranged lines of credit. Except for facilities staffed for the purposes cited in section 73.7 of this Part, they shall not include staffed facilities.

(c) 'Point-of-sale terminals' shall mean electronic devices, either on-line or off-line, whose function is to transfer funds or record transfers of funds in connection with the sale of goods or services but which may also be used to accept deposits and loan repayments, make cash withdrawals, and obtain funds pursuant to prearranged lines of credit. These terminals may be located only at

bona fide checkout counters, cashier stations, customer convenience counters, or other counters at which store functions are performed, or sales desks of other establishments, and may not be staffed by bank employees, with the exceptions noted in section 73.7 of this Part.

(d) 'Similar facilities' shall mean electronic devices, either on-line or off-line, which may be used for making deposits, withdrawals, transfers of funds, loan repayments or disbursements of funds pursuant to prearranged lines of credit. Except as otherwise provided in section 73.7 of this Part, such facilities, if part of a store's bona fide customer convenience counter or other counter at which store functions are performed, or sales desks of other establishments, may be staffed but only by non-bank employees; if located anywhere else, they may not be staffed.

(e) 'Banking organizations' shall mean banks, trust companies, savings banks, and savings and loan associations.

73.3 Establishment or Sharing of Electronic Facilities.

Facilities. Any banking organization that has given the Superintendent the notice described in section 73.6(a) or (b) of this Part, as the case may be, may establish or share an electronic facility upon receipt of written notification from the Superintendent that he does not object to the establishment or sharing of such facility. The Superintendent shall not object to the establishment or sharing of an electronic facility unless the banking organization submitting the notice fails to meet the

requirements of Banking Law section 28-b and Part 76 of this Title or the establishment or sharing of such facility is prohibited by the home office protection provisions of Banking Law sections 105(1)(ii), 240(2)(b), or 396(2)(b).

73.4 Sharing Facilities. To the extent consistent with law, banking organizations may share electronic facilities they have established with other banking organizations, banking institutions not subject to the provisions of this Part, and non-banking entities, and may share electronic facilities established by other banking organizations, banking institutions not subject to this Part, or non-banking entities.

73.5 Facilities Not Requiring Prior Notification. The following activities do not require any prior notification to the Superintendent:

(a) The establishment by a banking organization of an electronic facility on the premises of one of its authorized, staffed banking offices or attached to the outer wall of such an office;

(b) The establishment or sharing of an electronic facility to the extent it is used solely to effect transactions among banking institutions, clearing-houses, clearing corporations, governmental institutions or governmental agencies, business firms or similar organizations, or between one or more of these types of organizations; and

(c) The sharing of an electronic facility when the customers of the sharing institution may use the facility solely to obtain information about account balances,

make cash withdrawals (including those that require transfers of funds among a customer's accounts), and obtain cash advances against credit lines.

73.6 Contents of Notice. (a) The notice to the superintendent prior to the establishment of an electronic facility shall include the following:

(1) The complete legal address of the proposed facility, including whether such location is in a city, village, or unincorporated area;

(2) A certified copy of a resolution duly adopted by a majority of the banking organization's board of directors or board of trustees, as the case may be, authorizing the submission of the notice, which resolution may be a general resolution authorizing the submission of all such notices;

(3) Identification of the type of facility to be established and a description of the activities to be performed initially;

(4) A statement as to whether the facility will be shared initially, including the names of any initial sharing institutions;

(5) An estimate of the total initial and annual operating costs of the facility; and

(6) Details of any transaction involving the establishment or initial sharing of the facility with an 'insider' as defined in Part 11 of this Title or with any related interest of such a person.

(b) The notice to the Superintendent prior to the sharing of an electronic facility shall include the following:

(1) The complete legal address of the facility, including whether such location is in a city, village, or unincorporated area;

(2) A certified copy of a resolution duly adopted by a majority of the banking organization's board of directors or board of trustees, as the case may be, authorizing the submission of the notice, which resolution may be a general resolution authorizing the submission of all such notices; and

(3) Identification of the type of facility to be shared and a description of the activities to be performed.

73.7 Restrictions on Electronic Facilities. (a) No electronic facility may be staffed by employees of a banking organization. However, employees of a banking organization may be used to demonstrate the equipment, to train non-bank employees for a reasonable period of time, to provide information, to repair and service the electronic equipment, or as security guards.

(b) All banking organizations shall take the necessary steps to protect their interests in the activities of their electronic facilities, including the acquisition of appropriate fidelity and other insurance coverage, and to safeguard the identity of bank customers in the use of such facilities.

(c) No new accounts may be opened at electronic facilities, and no cash, check, money order, or draft of any kind may be taken with application forms if such forms are filled out and left at the electronic facility.